STATE OF MICHIGAN

IN THE SUPREME COURT

PHYLLIS L. GRIFFITH, Legal Guardian for Douglas W. Griffith, a legally a legally incapacitated adult,

Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant.

Supreme Court
Case No. 122286

Court of Appeals
Case No. 232517

Ingham County Circuit Court
Case No. 97-87437-NF

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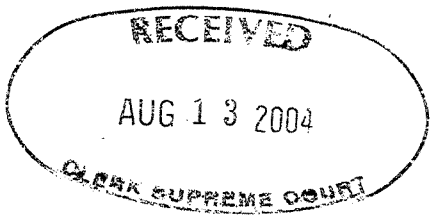
BRIEF OF PLAINTIFF-APPELLEE, PHYLLIS L. GRIFFITH, LEGAL GUARDIAN FOR DOUGLAS W. GRIFFITH, A LEGALLY INCAPACITATED ADULT

*** * * ORAL ARGUMENT REQUESTED * * ***



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Dated: **August 13, 2004**

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CONCURRING STATEMENT OF JURISDICTION

Appellee concurs with Appellant's Statement of Jurisdiction.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE COURT SHOULD REJECT APPELLANT'S INVITATION TO IGNORE AND DEPART FROM THE ORDINARY AND COMMONLY UNDERSTOOD MEANING OF THE TERM *"ACCOMMODATION"* SELECTED BY THE LEGISLATURE WHEN IT ENACTED THE *"ALLOWABLE EXPENSE"* PROVISION UNDER THE MICHIGAN AUTOMOBILE NO-FAULT ACT [MCL 500.3107(1)(a)]?

Plaintiff-Appellee answers "Yes."

Defendant-Appellant would answer "No."

The Court of Appeals answered "Yes."

II. WHETHER THE COURT SHOULD REJECT APPELLANT'S INVITATION TO OVERRIDE LONG ESTABLISHED MICHIGAN NO-FAULT JURISPRUDENCE THAT CLEARLY PROHIBITS PIP BENEFITS FROM BEING WITHHELD OR REDUCED BY PERSONAL CONSUMPTION FACTORS?

Plaintiff-Appellee answers "Yes."

Defendant-Appellant would answer "No."

The Court of Appeals answered "Yes."

III. WHETHER THE COURT SHOULD REJECT APPELLANT'S INVITATION TO OVERRIDE LONG ESTABLISHED MICHIGAN NO-FAULT JURISPRUDENCE THAT HAS ROUTINELY REJECTED A *"SITUS"* TEST IN DETERMINING WHETHER THERE IS SUFFICIENT CAUSALITY TO TRIGGER PAYMENT OF PIP BENEFITS?

Plaintiff-Appellee answers "Yes."

Defendant-Appellant would answer "No."

The Court of Appeals answered "Yes."

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COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

On April 28, 1994, Douglas W. Griffith, then 63-years-old, was involved in a motor vehicle accident. Mr. Griffith suffered accidental bodily injury including a severe and debilitating traumatic brain injury. Mr. Griffith's brain injury is so severe, he is entirely dependant on others for his care and supervision. (17a.)

Following his discharge from the hospitals and rehabilitation medical facilities, Mr. Griffith was placed in a commercially based institutional care facility for over two years. It was during this time that Appellee began exploring the option of providing Mr. Griffith home based institutional care. After extensive consultations with Mr. Griffith's medical providers, considerable planning, and weighing of risks and potential benefits, Appellee was convinced that she could provide Mr. Griffith 24-hour home based institutional care that he was otherwise receiving from the commercially based institutional care facilities. On August 6, 1997, Appellee brought Mr. Griffith home. (17a.)

Appellee submitted allowable expense claims, including those incurred for food totaling $10 per day. Appellant denied this element of the claim and litigation followed. (4a, ¶ 12(b).) Appellee filed a motion for a legal ruling regarding the compensability of the food expense. (16a.) The trial court ruled in favor of Appellee that his food expenses was compensable as an *"allowable expense"* under §3107(1)(a). In support of its ruling, the trial court expressly acknowledged that existing case law, i.e., *Reed v Citizens Ins Co*, 198 Mich App 443 (1993) *lev den*, 444 Mich 964 (1993), controlled the disposition of its ruling. In this regard, the trial court stated in pertinent part

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> "***It's clear to the Court that under existing case law, the Plaintiff is entitled to reimbursement for his food costs***. . . . *The test here is not, as Defendant has stated, one of cheapness,* ***but rather, care, recovery and rehabilitation; and if those goals are better advanced by the current arrangement, they must be paid for.***" (41a – Tr 3/22/00, 11.)

Dissatisfied with the existing case law relied upon by the trial court, Appellant filed a claim of appeal. The Court of Appeals rejected Appellant's invitation to overturn the *Reed* rule. (47a.) After initially denying Appellant's application for review, upon reconsideration, this Court granted leave to appeal on March 19, 2004.

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ARGUMENT

Defendant-Appellant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY ("Appellant"), appeals a $10 per day dispute regarding Douglas W. Griffith, a 73-year-old catastrophically injured person who Appellee concedes *would otherwise be institutionalized* at a commercial care facility but for his spouse's determination and willingness to provide him 24-hour per day home based institutional care. (Appellant's Brief, p 5.) Appellant does not dispute that it would pay considerably higher daily boarding expenses if Mrs. Griffith were to decide today to discontinue providing Mr. Griffith 24-hour per day home based quasi-institutional care. Appellant urges this Court to overturn long established Michigan no-fault jurisprudence and instead, judicially legislate a rule that the insurance industry has unsuccessfully suggested in several cases before our appellate courts since the inception of No-Fault Act – a statutory reparations scheme that the insurance industry itself wrote and sold to the citizens of Michigan in 1973.

I. THE COURT SHOULD REJECT APPELLANT'S INVITATION TO IGNORE AND DEPART FROM THE ORDINARY AND COMMONLY UNDERSTOOD MEANING OF THE TERM *"ACCOMMODATION"* SELECTED BY THE LEGISLATURE WHEN IT ENACTED THE *"ALLOWABLE EXPENSE"* PROVISION UNDER THE MICHIGAN AUTOMOBILE NO-FAULT ACT [MCL 500.3107(1)(a)].

A. In construing no-fault benefit compensability under §3107(1)(a), the rules of statutory construction compel this Honorable Court to conclude that the term "accommodation" necessarily includes room and board (i.e., food) as an "allowable expense".

Under the organizational framework of the no-fault act (MCL 500.3101 *et seq*), §3107 is the first section that determines the compensable category and extent of PIP benefits an insurer is liable to pay. Under § 3107, the first identifiable sub-category of PIP benefits an insurer is liable

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to pay is *"allowable expenses."* Contained within the allowable expense provision are three (3) specific sub-categories which qualify as *"benefits" "an insurer is liable to pay,"* to wit: *"products, services and accommodations."* In this regard, §3107(1)(a), unambiguously states:

> *"[P]ersonal protection insurance benefits are payable for the following:*
>
> *(a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary* ***products, services and accommodations*** *for an injured person's care, recovery or rehabilitation."*

Importantly, again, is the fact that theses terms are not expressly defined anywhere in the No-Fault Act. Therefore, it must be presumed the Legislature intended the terms be given their ordinary and understood meaning. Had the Legislature intended or desired to limit the type or nature of an *"accommodation,"* for example, it would have done so by further definition or delineation.

The *Random House Webster's Collegiate Dictionary* (1991),[1] defines the term *"accommodation"* as follows:

> *"**ac·com·mo·da·tion** n. **1.** the act of accommodating; the state or process of being accommodated; adaptation. **2.** adjustment of differences; reconciliation. **3.** a process of mutual adaptation between persons or social groups, usu. achieved by eliminating hostility. **4.** Anything that supplies a need, want, convenience, etc. **5.** Usu., **accommodations. a.** lodging. **b. food and lodging. c.** a seat, berth, etc., on a train, plane, or other public vehicle. 6. readiness to aid others; obligingness. . . ."*
> (Emphasis supplied)

[1]A majority of this Court has cited with approval this dictionary as providing authoritative, commonly understood meaning to unambiguous terms. *See, e.g., Neal v Wilkes,* ___ Mich ___ (2004)(Slip Op, dated July 20, 2004, p 8, fn 9.); *Kreiner v Fischer,* ___ Mich ___ (2004)((Slip Op, dated July 23, 2004, p 24.).

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The *Webster's Third New International Dictionary,*[2] defines the term as follows:

> "***ac•com•mo•da•tion*** *\ ... 1 a : something that is supplied for convenience or to satisfy a need ‹ huts with no sanitary ~ or running water ... ›: as (1) ROOM, SPACE ‹ the library ~ is leased ... › **(2) : lodging, food, and services** (as a hotel) or seat, berth, or other space occupied together with services available (as on a train) – usu. used in pl. ‹ tourist ~ s on the boat › ‹ overnight ~ s for visitors›. . . .*"
> (Emphasis supplied)

The *Random House Webster's College Dictionary* (1997)[3], defines the term as follows:

> "***ac•com•mo•da•tion*** *n.* ***1.*** *the act of accommodating; the state or process of being accommodated; adaptation.* ***2.*** *adjustment of differences; reconciliation.* ***3.*** *a process of mutual adaptation between persons or social groups, usu. achieved by eliminating or reducing hostility.* ***4.*** *anything that supplies a need, want, convenience, etc.* ***5.*** *Usu.,* ***accommodations.*** *a. lodging.* ***b. food and lodging****. . . ."*
> (Emphasis supplied)

Finally, the *American Heritage Dictionary (2rd College ed)*[4], defines the term as follows:

> *"**ac•com•mo•da•tion** n.* ***1.*** *The act of accommodating or state of being accommodated; adjustment.* ***2.*** *Something that meets a need; convenience.* ***3. accommodations. a.*** *Lodgings;* ***room and board****. . . ."*
> (Emphasis supplied)

Thus, without limitation, the plain understanding of the term *"accommodation"* necessarily includes room and board (*i.e.,* food) as an *"allowable expense"* under §3107(1)(a).

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[2]A majority of this Court has cited with approval this dictionary as providing authoritative, commonly understood meaning to unambiguous terms. *See Rednour v Hastings Mut Ins Co*, 468 Mich 241, 248 (2003).

[3]A majority of this Court has cited with approval this dictionary as providing authoritative, commonly understood meaning to unambiguous terms. *See People v Morey*, 461 Mich 325, 331 (1999).

[4]A majority of this Court has cited with approval this dictionary as providing authoritative, commonly understood meaning to unambiguous terms. *See Robinson v City of Detroit*, 462 Mich 439, 456 (2000).

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Nowhere within the No-Fault Act, let alone §3107(1)(a), is there language that uses words, phases or concepts that engage in an *"uninjured versus injured person"* concept for determining benefit compensability, as proffered by Appellant (Appellant's Brief, p 18). The Appellant's invitation to judicially legislate this test is strictly prohibited by the rules of statutory construction. This rule prohibiting judicial activism was prominently recalled in the case of *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143 (2000), where this Honorable Court sharply criticized its predecessor for injecting phrases and concepts into the statutory highway exception to governmental immunity. In this regard, Justice Markman writing for the majority, stated in pertinent part at pages 176-177:

> *"While we agree with Pick [v Szymczak, 451 Mich 607 (1996)] that the first sentence of the statutory clause establishes a general duty to repair and maintain highways so that they are reasonably safe and convenient for public travel, this duty, with regard to the state and county road commissions, is significantly limited, extending 'only to the improved portion of the highway designed for vehicular travel.' MCL 691.1402(1); MSA 3.996(102)(2)(emphasis added).* ***Nowhere in this language, or anywhere else in the statutory clause, do phrases such as 'known points of hazard,' 'points of special danger,' 'integral parts of the highway,' or 'traffic sign maintenance' appear.*** *We are not persuaded that the highway exception contemplates 'conditions' arising from 'point[s] of hazard,' 'areas of special danger,' or 'integral parts of the highway,' outside of the actual roadbed, paved or unpaved, designed for vehicular travel.* ***None of these phrases or concepts appears anywhere within the provisions of the highway exception. To continue to rely upon these phrases in determining the scope of the highway exception is contrary to the language selected by the Legislature in creating the exception.***"
> (Emphasis supplied)

Thus, when the No-Fault Act is strictly construed, there is no limiting phrase or concept regarding the compensability of an *"allowable expense" "benefit"* other than what is commonly understood to be a *"product, service or accommodation."* Rather, the only concomitant requirements are (1) whether the product, service or accommodation is *"reasonably necessary . . . for an injured person's care, recovery or rehabilitation;"* and (2) whether the charge for the

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expense incurred was *"reasonable."* *Nasser v Auto Club Ins Assoc,* 435 Mich 33, 50 (1990). No further analysis is warranted or permitted. Therefore, Appellee's $10 per day food expense constitutes a compensable *"allowable expense"* benefit under §3107(1)(a).

Based upon the foregoing, the Court should reject the Appellant's invitation to ignore and depart from the ordinary and commonly understood meaning of the term *"accommodation"* selected by the Legislature when it enacted the *"allowable expense"* provision under the no-fault act [MCL 500.3107(1)(a)].

II. THE COURT SHOULD REJECT APPELLANT'S INVITATION TO OVERRIDE LONG ESTABLISHED MICHIGAN NO-FAULT JURISPRUDENCE THAT CLEARLY PROHIBITS PIP BENEFITS FROM BEING WITHHELD OR REDUCED BY PERSONAL *"CONSUMPTION FACTORS."*

A. In determining no-fault benefit compensability or calculation thereof under §3107 and §3108, the cost or value of the insured's alleged personal consumption factors are never considered because they interfere with the expeditious goal of the no-fault reparations system by creating unnecessary complex factual disputes and administrative delays.

Appellant's proposed *"uninjured versus injured person"* judicial fix suggests there should be a *"personal consumption"* exclusion in no-fault. This concept has been resoundingly repudiated by Michigan no-fault jurisprudence. Essentially, Appellant is advancing an old argument that says: if you needed it before the accident, then it is excluded as a no-fault benefit. In *Miller v State Farm Mut Ins Co,* 410 Mich 538 (1981), this Honorable Court rejected Appellant's effort in that case to impose a *"personal consumption"* factor when calculating §3108 survivors' loss benefits. The Court held that the calculation of survivors' loss benefits should not take into consideration a

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"personal consumption" factor relating to personal expenses of the deceased that are avoided by reason of death.

With respect to this issue, Justice Ryan writing for the majority, noted there are at least two (2) persuasive indications that demonstrate why the Legislature did not indent such a *"consumption factor"* to be deducted in calculating no-fault survivors' loss benefits. First is the strict interpretation of the plain and unambiguous language of §3108 which does not allow for a *"consumption factor"* reduction. Justice Ryan noted that one of the alternative bills being considered at the time of the passage of the No-Fault Act contained express language permitting a setoff for expenses avoided by the decedent's death. Obviously, the statute which was ultimately enacted was written without this clause. Accordingly, the Court held that reading such language into the statute, as suggested by State Farm then, was contrary to plain language and history of §3108. In this regard, the court held at pages 565 - 567:

> *"Relying on the provision of §3108 that survivors' loss benefits are payable to a dependent for the loss of such 'tangible things' as the dependent 'would have received for support' but for the decedent's death, the defendant makes a forceful argument that such fund does not include either the taxes discussed in the previous section or such sums as would have been consumed by the decedent himself for food, recreation, clothing and personal expenses. The bare language of the statute does indeed suggest that meaning. Certainly, if it was the intent of the Legislature, in employing the language chosen, to require that the dollar amount of survivors' loss benefits be computed by deducting from the 'tangible things of economic value' a 'consumption factor' attributable to the deceased's personal expenses, we must require application of such a formula.* ***However, there are at least two persuasive indications that despite the apparently plain and simple language of the statute to the effect suggested by defendant, the Legislature did not intend such a 'consumption factor' to be deducted in calculating survivors' loss benefits.***
>
> *The first is the legislative history of the adoption of §3108. . . . We are aided in discovering the legislative intent in enacting any statute by examining the proposed legislation it considered and rejected, contrasted with the provisions as finally adopted. . . . As has been indicated, §3108 was enacted after consideration of at*

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*least two alternatives. . . . * * * The myriad of activities that attended the legislative process having run their course,* ***1972 PA 294 was enacted containing language consistent with that of Senate Bill No. 782 and without the clause 'less expenses of the survivors avoided by reason of the decedent's death' which appeared in the House substitute bill.***

It is logical to conclude that the Legislature eliminated the italicized clause for a reason, and most likely the reason was that it wished to preclude reduction of the amount of survivors' loss benefits by the decedent's 'consumption factor'. We are asked, however, to hold, as did the Court of Appeals, that the Legislature meant in §3108 not only what it did not say explicitly, but what it explicitly rejected. We are not inclined to do so. . . . *See also 2A Sutherland's Statutory Construction (4th Ed), § 48.18, pp 224-225."*
(Emphasis supplied)

Therefore, according to traditional principles of statutory construction, this Court once again rejected a no-fault insurer's attempt to judicially legislate into the No-Fault Act, words, phrases or concepts that do not appear anywhere within either §3108 or the Act itself. Doing so would have been contrary to the express language chosen by the Legislature. *Nawrocki, supra* at pp 176-177.

According to Justice Ryan, the second reason militating against permitting a personal *"consumption factor"* is that it would produce administrative delays and factual disputes that would violate the declared purpose of the No-Fault Act as a whole. In this regard, Justice Ryan stated in pertinent part, at pages 567-568:

"The second reason we think the Legislature did not intend that a 'consumption factor' for the decedent's personal expenses be calculated and deducted from the fund of 'things of tangible value' that the decedent's dependents would otherwise have received is found in our understanding of the purpose of the no-fault act itself and the manner in which it is intended to be applied.

In Shavers v Attorney General, 402 Mich 554, 578-579; 267 NW2d 72 (1978), we said: 'The goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses'. The act is designed to minimize administrative delays and factual disputes that would interfere with achievement of the goal of expeditious compensation of

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damages suffered in motor vehicle accidents. . . . ***Calculation, in every case, of a 'consumption factor' attributable to the decedent's personal expenses would be inconsistent with the declared legislative purpose of expeditious settlement of survivor's claims without complex factual controversy. . . .***

**** * * In view of the no-fault act's goal of expeditious reparation of motor vehicle accident injuries, and minimization of potential factual disputes, we conclude that the Legislature's explicit rejection of the language in the House substitute bill concerning the reduction of survivors' loss benefits by the decedent's 'personal consumption factor' evidences an intent that survivors' loss benefits not be so adjusted. The amount of such person consumption factor is likely small in most cases, and the administrative delays and factual controversies that might be engendered by such a calculation would unjustifiably interfere with the above-discussed goals of the act."***
(Emphasis supplied)

The ramifications of adopting the concept offered by Appellant herein is exactly what the court in *Miller* warned against and rejected. The no-fault reparation system was designed to reduce disputes and concomitantly, tedious litigation. Yet, the Appellant's proffered test does nothing but breed such litigation because of all of the imaginable horrible fact issues it would produce, regardless if the injured person sustained a catastrophic loss.

The *Miller* principal was repeated in *Sharp v Preferred Risk Mut Ins Co*, 142 Mich App 499 (1985), *lv den* 425 Mich 880 (1986),[5] where the insurer attempted once again to judicially insert a *"consumption factor"* concept. The court held that the no-fault insurer in this case was obligated to pay the entire cost of the rental of an apartment where plaintiff's disabled son lived for approximately two (2) years until a special handicapper-accessible addition was completed at plaintiff's home. The alternative to living in this apartment would have been to reinstitutionalize plaintiff's son in an extended care facility. It was undisputed that the environment of the apartment

[5]In fact, the rejected test proffered by the no-fault carrier in *Sharp* mirrors the same *"uninjured verses injured person"* test that Appellant invites today.

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was more conducive to the rehabilitation of plaintiff's son. The cost of reinstitutionalizing plaintiff's son would have been $2,800 per month. The maximum rental for the apartment was $445 per month. Prior to the accident, plaintiff's son lived alone in another apartment and paid $245 per month for rent.

In ruling that the insurance company was obligated to pay the *entire monthly rental* on the apartment, the court relied upon *Manley v DAIIE,* 127 Mich App 444 (1983). In *Manley*, the court reasoned that even though everyone must have food to survive, the extraordinary cost of obtaining food for an institutionalized patient renders the entire cost of food an allowable expense. The Court of Appeals in *Sharp* applied that reasoning and held the full rental cost was an allowable expense, rejecting the no-fault insurer's concept of a *"consumption factor"* reduction. In this regard, the court stated in pertinent part at page 511:

> *"We think the same reasoning applies to the cost of the apartment.* ***As long as housing larger and better equipped is required for the injured person than would be required if he were not injured, the full cost is an 'allowable expense.'"***

Parenthetically, the court also noted that a contrary ruling would, in essence, penalize the plaintiff for saving the insurance company a lot of money. In this regard, the court stated in pertinent part at page 512:

> *"Such a decision could result in discouraging home care, which is usually less expensive and offers a higher quality of care than nursing home care in this instance."*

This point is noteworthy to bring up because it undeniably applies to the case at bar. Although Appellant states an important purpose of the No-Fault Act includes cost-containment (Appellant's Brief, p 23), Appellant, however, never made a record below demonstrating a material financial injustice as a result of the lower courts' rulings. Although Appellant had every opportunity to make

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a factual record before the trial court comparing Mr. Griffith's $10 per day home-based institutional boarding expenses with daily commercial boarding expenses he would otherwise incur if he remained institutionalized in a commercially based care facility, Appellant elected not to do so. The reason it did not attempt to make such a factual record is undeniable: because Mrs. Grffith's willingness and determination to provide Mr. Griffith home-based institutional care actually *contains costs* for Appellant and the taxpayers of the State of Michigan.

The evolution of the *Miller* principal was repeated once again in *Manley v DAIIE,* 425 Mich 140 (1986). In *Manley*, the majority opinion specifically affirmed the Court of Appeals' ruling that the child's parents were not precluded from recovering for various in-home care expenses simply because they were legally obligated to support their minor son while he resides at home. In this regard, the court held in pertinent part at page 153:

> *"A no-fault insurer is not relieved of the obligation to pay no-fault benefits for products, services, and accommodations provided a child which, if the injured person were an adult, are allowable expenses within the meaning of §3107.* ***Although the parent of the child might be obligated to pay for such products, services or accommodations as 'necessaries essential to the health and comfort of the child' if there was not a no-fault act, there is a no-fault act. Under that act, the question is whether the product, service, or accommodation is an allowable expense, not whether someone else might also be legally obligated to pay such expense under some other provision or rule of law.***"
> (Emphasis supplied)

Manley is also notable for its stripping of the insurance industry's temporary success in convincing the Court of Appeals to judicially legislate its *"consumption factor"* concept into the No-Fault Act. Justice Boyle authored a separate opinion in which she concurred with the majority's holding on this point and further criticized the insurance industry's *"consumption*

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factor" concept as *"unwieldly and unworkable."* *Manley,* 425 Mich at 169 (Boyle, J. Concurring and dissenting).

This historical evolution of the *Miller* principal was the foundation for the holding in *Reed v Citizens Ins Co,* 198 Mich App 443 (1993) *lv den*, 444 Mich 964 (1993), where the court held that the expense of food in a home-based institutional care setting constitutes an *"allowable expense"* under §3107(1)(a) of the No-Fault Act. In *Reed*, the Court of Appeals flatly rejected the no-fault insurer's renewed invitation to judicially reinsert its desired *"consumption factor"* concept that was forcefully repealed in *Manley, supra.* Instead, the court in *Reed* held true to the plain language of §3107(1)(a), in determining benefit compensability, i.e., *"reasonably necessary"* and *"reasonable charge."* In this regard, the court stated at pages 452-453, in pertinent part:

> *"We see no compelling reason not to afford the same compensation under the act to family members who provide room and board.* ***Subsection 1(a) does not distinguish between accommodations provided by family members and accommodations provided by institutions, and we decline to read such a distinction into the act.*** *Moreover, holding that accommodations provided by family members is an 'allowable expense' is in accord with the policy of this State. See Sharp v Preferred Risk Mutual Ins Co, 142 Mich App 499, 511-512; 370 NW2d 619 (1985); Manley, 425 Mich 168-169 (BOYLE, J., concurring in part and dissenting in part); Van Marter, supra, 181. Denying compensation for family-provided accommodations while allowing compensation in an institutional setting would discourage home care that is generally, we believe, less costly than institutional care. . . .*
>
> ** * * **We disagree with the rule stated in Manley that expenses that are as necessary for uninjured personas they are for injured persons are not allowable expenses**. Rather, we agree with Justice BOYLE'S opinion in Manley that the rule is unwieldy and unworkable. 'Where a person who normally would require institutional treatment is cared for at home in a quasi-institutional setting made possible by the love and dedication of the injured victim's family,* ***the test for 'allowable expenses' should not differ from that set out in MCL 500.3107(1)(a). . . .***"
> (Emphasis supplied)

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Based upon the foregoing, Appellant's desire to re-insert this *"consumption factor"* concept into §3107(1)(a), is contrary to the plain language chose by the Legislature. *Nawrocki, supra.* Any condition or factor regarding benefit compensability under §3107(1)(a), other than being *"reasonably necessary"* and *"reasonable charge,"* is strictly prohibited.

Based upon the foregoing, the Court should reject Appellant's invitation to override long established Michigan no-fault jurisprudence that clearly prohibits PIP benefits from being withheld or reduced by personal *"consumption factors"*.

III. THE COURT SHOULD REJECT APPELLANT'S INVITATION TO OVERRIDE LONG ESTABLISHED MICHIGAN NO-FAULT JURISPRUDENCE THAT HAS ROUTINELY REJECTED A *"SITUS"* TEST IN DETERMINING WHETHER THERE IS SUFFICIENT CAUSALITY TO TRIGGER PAYMENT OF PIP BENEFITS.

A. In determining no-fault benefit eligibility under §3105 of the Act, Michigan courts have long established that mere "situs" provides an insufficient causal connection upon which to base the decision whether PIP benefits are payable.

Michigan no-fault jurisprudence has consistently held that mere *"situs"* does not establish a sufficient causal nexus for benefit eligibility under §3105. The birth of this rule came from *Shinabarger v Citizens Ins Co*, 90 Mich App 307 (1979). Mr. Shinabarger was fatally wounded when, although not entirely clear from the record, his shotgun discharged apparently while he was in the process of handing his gun to a passenger seated in the motor vehicle. Because the motor vehicle was parked at the time of the hunting incident, the benefit eligibility question involved consideration of both §3105 and §3106 of the No-Fault Act. The parties agreed that the motor vehicle was the site of the injury. The parties did not, however, stipulate that the operation,

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maintenance, or use of the motor vehicle as a motor vehicle was causally connected to the injury, as required by §3105. The court held that the mere *"situs"* of the injury was an insufficient causal nexus under §3105 and, therefore, the case was remanded for further factual and legal determination on that issue. In this regard, the court in *Shinabarger* stated at pages 314-315, in pertinent part:

> *"Where the injury is entirely the result of an independent cause in no way related to the use of the vehicle, however,* ***the fact that the vehicle is the site of the injury will not suffice*** *to bring it within the policy coverage. . . .*
>
> *Section 3106, which establishes criteria for accidents involving parked vehicles, does not abrogate the need for a causal connection between the automobile and the injury. As the wording of the section makes clear, it establishes only minimum criteria for accidents involving parked vehicles. Under §3106, no injury involving a parked vehicle may be compensated for unless one of the criteria therein is met; however, fulfillment of the requirements of §3106 does not automatically result in liability. Even after the threshold of §3106 is crossed,* ***it must still be established that the injury arose out of the ownership, operation, maintenance or use of the motor vehicle.***
>
> ***Although the parties in the case at bar agreed that the motor vehicle was the site of the injury suffered by Shinabarger, there was no stipulation that the use of the vehicle was a cause of the accident.*** *Instead, there is nothing in the record before us to indicate what caused the shotgun to discharge. Because the record does not establish a causal connection between use of the vehicle and the injury, the trial court erred in finding liability as a matter of law."*
> (Emphasis supplied)

The holding in *Shinabarger* is instructive for two reasons. First, the case demonstrates further that analysis under §3105(1) is confined to determining benefit eligibility, not benefit compensability which is contained in §3107 and §3108. And second, the case flatly rejects the Appellant's desired concept that *"situs"* establishes a sufficient causal nexus. As will be discussed below, nothing has changed.

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The *Shinabarger* rule rejecting mere *"situs"* as establishing a sufficient causal nexus for benefit eligibility was adopted by this Honorable Court in *Thornton v Allstate Ins Co,* 425 Mich 625 (1986). Mr. Thornton was catastrophically wounded when he was shot in the neck by a passenger he was transporting in his taxi-cab. The court held that plaintiff was not eligible for PIP benefits under §3105, because there was no causal connection between plaintiff's injury and his use of his motor vehicle. The motor vehicle was nothing more than the mere *"situs"* of his injury. In this regard, the court stated at pages 659-660, in pertinent part:

> *"In drafting MCL 500.3135(1); MSA 24.13105(1), the Legislature limited no-fault PIP benefits to injuries arising out of the 'use of a motor vehicle.' In our view, this language shows that the Legislature was aware of the causation dispute and chose to provide coverage only where the causal connection between the injury and the use of the motor vehicle as a motor vehicle is more than incidental, fortuitous, or 'but for.' The involvement of the car in the injury should be 'directly related to its character as a motor vehicle.' Therefore, the first consideration under MCL 500.3105(1) . . . must be the relationship between the injury and the vehicular use of a motor vehicle. Without a relation that is more than 'but for,' incidental, or fortuitous, there can be no recovery of PIP benefits.*
>
> *The connection in this case between the debilitating injuries suffered by Mr. Thornton and the use of the taxicab as a motor vehicle is no more than incidental, fortuitous, or 'but for.' The motor vehicle was not the instrumentality of the injuries.* ***The motor vehicle here was merely the situs of the armed robbery–the injury could have occurred whether or not Mr. Thornton used a motor vehicle as a motor vehicle. . . .*** *"*
> (Emphasis supplied)

The *Thornton* case is instructive for two (2) reasons. First, the court emphasizes that the proper analysis of §3105 is solely limited to determining benefit eligibility, not compensability. The court expressly states that the *"arising out of"* focus under §3105 is whether the injury is causally connected to the use of the motor vehicle, as a motor vehicle. Nowhere does the court state or infer that this analysis under §3105 further limits the nature or extent of benefits that are

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compensable under the No-Fault Act. The plain language of §3105(1), obviously, dictates this result. The second important point of the *Thornton* case is its confirmation that mere *"situs"* is an insufficient test or concept that establishes a causal connection.

The *Shinabarger/Thornton* rule has been consistently followed ever since. This Honorable Court re-affirmed the rule in *Bourne v Farmers Insurance Exchange*, 449 Mich 193 (1995). In *Bourne,* the plaintiff was assaulted during a robbery of his motor vehicle. Citing the *Shinabarger/Thornton* rule with approval, the court held plaintiff did not cross the threshold of §3105(1) because his injuries did not arise out his ownership, operation, maintenance, or uses of his motor vehicle, as a motor vehicle. Instead, his motor vehicle was merely the *"situs"* of his injury which did not establish a sufficient causal nexus for benefit eligibility under §3105(1). In this regard, the court stated at page 200, in pertinent part:

> *"In the present case, plaintiff's injuries did not arise out of the use of his vehicle as a motor vehicle. The carjacker simply struck plaintiff.* ***Hence, plaintiff's vehicle was at best the situs of the injury, which is not a sufficient causal connection between the injury and the vehicle.***"[6]

In addition to rejecting the mere *"situs"* concept as establishing a sufficient causal nexus, the court in *Bourne* once again demonstrated that analysis under §3105(1), is limited solely to determining benefit eligibility, not compensability. This point was made resounding clear in the recent case of *Morosini v Citizens Ins Co,* 461 Mich 303 (1999), a case involving an assault following a motor vehicle accident where the court applied its holdings reached in *Thornton,*

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[6]*Accord: McKenzie v ACIA*, 458 Mich 214 (1998)(citing *Thornton* with approval at page 222, and recognizing that sleeping in trailer was merely the situs of plaintiff's injury); *see also, Century Ins v League Gen Ins,* 213 Mich App 114, 121 (1995)(auto liability policy not implicated because dog bite incident did not arise out of ownership, maintenance, or use of a motor vehicle but instead ***"was the mere situs of the injury."***).

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Bourne and *McKenzie*, *supra*.[7] The court held the plaintiff was ineligible for no-fault benefits under §3105, because his injury did not arise out of his use of his motor vehicle, as a motor vehicle. In this regard, this Honorable Court stated at page 310, in pertinent part:

> *"Each of these decisions is instructive, and each supports our conclusion that the Legislature crafted the no-fault statute in a manner that excludes the facts of the present case. From these decisions we learn:*
>
> - ***Coverage is not mandated by the fact that the injury occurred within a moving vehicle**, or by the fact that the driver believed that the passenger entered the vehicle for the purpose of being transported. Thornton.*
> - ***The focus is on the relationship between the injury and the use of the motor vehicle as a motor vehicle**, not on the intent of the assailant. Marzonie.*[8]
> - *Incidental involvement of a motor vehicle does not give rise to coverage under the language enacted by the Legislature, even if assaultive behavior occurred at more than one location, and the vehicle was used to transport the victim from one place to the other. Bourne.*
> - *The statute authorizes coverage in the event of an assault only if it is 'closely related to the transportational function of motor vehicles.' McKenzie."*

(Emphasis supplied)

Thus, this Honorable Court has clearly stated that proper construction of §3105(1) is limited to determining benefit eligibility. Moreover, this Court has fundamentally held that the mere *"situs"* of the insured does not establish a sufficient causal nexus for determining benefit eligibility under §3105. When boiled down to its simplest form, Appellant's position is that the *"situs"* of the insured dictates when food is compensable as an *"allowable expense"* under §3107(1)(a).

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[7]Justices Taylor, Corrigan, Young, Markman and Weaver concurred in this plurality opinion.

[8]*Marzonie v ACIA*, 441 Mich 522 (1992)[gun victim not eligible for PIP benefits because injury not causally related to use of motor vehicle, as a motor vehicle under §3105(1)].

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Appellant readily concedes that room and board is compensable during in-patient hospitalization and other nursing care-like settings. (Appellant's Brief, p 15.) We can presume from this that Appellant would also agree room and board is compensable for those severely injured patients who reside, either permanently or temporarily, in group homes, transitional living facilities and long-term supervised residential facilities. Appellant's apparent contention is, therefore, that room and board *is* compensable provided the patient resides someplace other than his home. This is nothing more than a pure *"situs"* analysis which is of the same logic rejected by Michigan appellate courts in so many no-fault cases since *Shinabarger* and *Thornton*, *supra.*

The ramifications of the *"situs"* concept proposed by Appellant is far reaching in the health care industry. Appellant expressly avows its obligation to pay food expenses when its insureds are admitted to a hospital or convalescent home. This is true also when its traumatically brain injured insureds are transferred to residential transitional homes. In this residential home, however, no specialized medical care is being provided and there is typically no special dietary need, either. Rather, the primary service and reason for the residential home is to provide the brain injured individual supervision, retraining and reintegration. This example demonstrates how Appellant's *"situs"* concept fails because it does not dispute its obligation to pay for room and board even though its insured is not on a special diet or is receiving specialized medical care. There is no logical distinction between the residential transitional home and the injured person's home in this example.

This is also why Appellant's argument that attempts to distinguish the facts in our case from *Reed v Citizens*, *supra,* is without merit. The fact Mr. Griffith owns and lives in his own home, is rendered irrelevant by the aforementioned example. Moreover, even if we are to accept

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Appellant's alleged distinction as being relevant, then it can be quickly remedied by a simple legal fiat: Mr. Griffith's Conservator can, by simply signing a Quit Claim Deed, vest all legal title and interest Mr. Griffith currently possess to another individual, or even to a medical provider specializing in severe brain injury rehabilitation (e.g., Spectrum Continuing Care Center of Grand Rapids, Michigan). In so doing, Mr. Griffith would no longer own or be living in his own home. Appellee sincerely doubts this is the kind of legal gamesmanship Appellant intends its insureds are to engage in, in order to satisfy its desired *"situs"* concept.

Based upon the foregoing, Appellant's desired judicial fix by inserting a *"situs"* concept test into §3107(1)(a), therefore, fails for two (2) logical reasons. First, it is contrary to the express language chosen by the Legislature. *Nawrocki, supra.* And second, it is fundamentally contrary to Michigan no-fault jurisprudence which has resoundingly rejected such a test as establishing a sufficient causal nexus. *Thornton, supra,* and its progeny.

B. The rule articulated by the Court of Appeals in Reed v Citizens Ins Co, provides the only logical causation test to determine if room and board expenses for catastrophically injured persons cared for at home is a compensable no-fault benefit: i.e, room and board expenses are compensable only if the injured person would otherwise require institutionalization.

Notwithstanding the foregoing, if this Honorable Court decides to go beyond the plain language of §3107(1)(a) and judicially legislate into the No-Fault Act words, phrases or concepts that otherwise do not appear in order to determine when food is or is not a compensable *"allowable expense"* benefit, then Appellee submits that the most limited, logical, cost-containing approach is the *Reed* rule. The *Reed* rule only applies to a limited number of catastrophically injured no-fault claimants, like Mr. Griffith, who, but for a family member's willingness to provide 24-hour

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home-based institutional care, would otherwise require commercially-based institutional care. In these limited circumstances, expenses incurred for room and board are compensable as an *"allowable expense"* benefit under §3107(1)(a). This is eminently logical because it has a built-in causality feature: otherwise institutionalized = food expense is allowable. In this regard, the court in *Reed* stated at pages 452-453, in pertinent part:

> *"We see no compelling reason not to afford the same compensation under the act to family members who provide room and board.* ***Subsection 1(a) does not distinguish between accommodations provided by family members and accommodations provided by institutions, and we decline to read such a distinction into the act.*** *Moreover, holding that accommodations provided by family members is an 'allowable expense' is in accord with the policy of this State. See Sharp v Preferred Risk Mutual Ins Co, 142 Mich App 499, 511-512; 370 NW2d 619 (1985); Manley, 425 Mich 168-169 (BOYLE, J., concurring in part and dissenting in part); Van Marter, supra, 181.* ***Denying compensation for family-provided accommodations while allowing compensation in an institutional setting would discourage home care that is generally, we believe, less costly than institutional care.*** *. . .*
>
> ***We hold that, where an injured person is unable to care for himself and would be institutionalized were a family member not willing to provide home care, a no-fault insurer is liable to pay the cost of maintenance in the home. . . . 'Where a person who normally would require institutional treatment is cared for at home in a quasi-institutional setting made possible by the love and dedication of the injured victim's family, the test for 'allowable expenses' should not differ from that set out in MCL 500.3107(1)(a).*** *The injured victim and the victim's family should be able to make the decision regarding where the victim's care occurs, rather than the no-fault insurer. This can be accomplished without placing an unreasonable economic burden on the no-fault insurer. . . ."*
> (Emphasis supplied)

The *Reed* rule further recognizes cost-containment, just like the court in *Sharp, supra*. Recall, that in *Sharp*, the court stated in pertinent part at page 512:

> *"Such a decision could result in discouraging home care, which is usually less expensive and offers a higher quality of care than nursing home care in this instance."*

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These points are important to recognize, because they have direct application to the case at bar. Appellant disputes a $10 per day expense, for a 73-year-old, catastrophically injured person. Although Appellant states an important purpose of the No-Fault Act includes cost-containment (Appellant's Brief, p 23), Appellant, however, never made a record below demonstrating a material financial injustice as a result of the lower courts' rulings. Although Appellant had every opportunity to make a factual record before the trial court comparing Mr. Griffith's $10 per day home-based institutional boarding expenses with daily commercial boarding expenses he would otherwise incur if he remained institutionalized in a commercially-based care facility, Appellant elected not to do so. The reason it did not attempt to make such a factual record is undeniable: because Mrs. Griffith's willingness and determination to provide Mr. Griffith home-based institutional care actually *contains costs* for Appellant and the taxpayers of the State of Michigan.

Finally, the *Reed* rule does not apply to all catastrophic no-fault claims. For example, a person can suffer catastrophic injury (e.g., paraplegia) but not require life-long institutional care. In those cases when the insured is discharged home, he or she *cannot* claim room and board expenses under *Reed*. Based upon the foregoing, the court should reject Appellant's invitation to override long established Michigan no-fault jurisprudence that has routinely rejected a *"situs"* concept in determining whether there is sufficient causality to trigger payment of PIP benefits. Rather, the court should maintain the *Reed* rule which adheres to the plain language of §3105 and §3107(1)(a) of the No-Fault Act chosen by the Legislature. *Narwrocki, supra.*

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The gravamen of the industry's proposed rule is twofold: (1) it penalizes people whose family chooses to care for them instead of leaving them in an institutional care setting; and (2) it seeks to give no-fault insurers a windfall. Appellant attempts to disguise these factors by its self-serving benevolence in paying attendant care to the family and for costly home modifications. It is not benevolence, because what Appellant is doing in those instances is discharging its statutory obligation and contractual responsibility to pay for *"products, services and accommodations reasonably necessary for"* Mr. Griffith's *"care, recovery or rehabilitation."* MCL 500.3107(1)(a). Appellant's attempt to bootstrap its legal argument with doing what it is obligated to do under the law is disingenuous.

Based upon the foregoing, Appellee respectfully requests this Honorable Court to affirm the holding of the Court of Appeals.

Respectfully submitted:

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